

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Broadband PCS Spectrum Auction) PN Rpt. AUC-03-58-A (Auction No. 58)
Scheduled for January 12, 2005) DA 04-1639

To: Wireless Telecommunications Bureau

COMMENTS OF THE DESIGNATED ENTITY PROGRAM SUPPORTERS

The Designated Entity Program Supporters^{1/} (“DE Supporters”) respectfully submit these Comments in response to the above-referenced Notice (“Auction 58 PN”). The DE Supporters ask the Commission not to disturb the rules governing designated entity (“DE”) bidding credits and set-asides for C-Block licenses.^{2/}

The DE Program was born in 1993 when Congress adopted Section 309(j) of the Communications Act, in which it authorized the Commission to employ systems of competitive bidding to award spectrum licenses with the objectives of

promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the public by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, i.e. “designated entities[.]”

^{1/} The DE Supporters include the Minority Media and Telecommunications Council, Hispanic Americans for Fairness in Media, Hispanics in Information Technology and Telecommunications, Lawyers Committee for Civil Rights Under Law, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Association for the Advancement of Colored People, National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Coalition of Hispanic Organizations, and the National Urban League. These Comments reflect the institutional views of each of the DE Supporters and are not intended to reflect the views of any of their individual members, directors or advisors.

^{2/} See 47 C.F.R. §24.709(a) (discussed in the Auction 58 PN, p. 2 and ns. 3-5).

Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312 (1993), codified at 47 C.F.R. §309(j)(3). The Designated Entity Program for Personal Communications Services (“PCS”) licenses, in its present form, was reaffirmed in Installment Payment Financing for PCS Licenses, Sixth R&O and Order on Reconsideration, 15 FCC Rcd 16266 (2000) (“Sixth R&O”). Therein, the Commission promised to apply its new rules “to any subsequent auctions of C or F block licenses” including – serendipitously – “any spectrum made available or reclaimed from bankruptcy proceedings in the future.” Id. at 16267 ¶1.

The DE Program helps fulfill three congressional commands: first, under 47 U.S.C. §257, to undertake to eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services;”^{3/} second, under 47 U.S.C. §151, to ensure nondiscrimination in its administration of the spectrum;^{4/} and third, under 47 U.S.C. §309(j), to promote minority ownership in spectrum-based services.^{5/}

^{3/} 47 U.S.C. §257(a). Section 257 also establishes a "National Policy" under which the Commission shall promote “diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity.” 47 U.S.C. §257(b). Congress expects the Commission to report, every three years, on “any regulations prescribed to eliminate barriers within its jurisdiction....” 47 U.S.C. §257(c).

^{4/} 47 U.S.C. §151, provides that the agency is created, inter alia, “so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service” (emphasis added).

^{5/} 47 U.S.C. 309(j)(4)(D) provides that the Commission shall “consider the use of tax certificates, bidding preferences, and other procedures” to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.”

As a means of fulfilling Congress' Section 257 objective of reducing barriers to entry for small firms, the need for the DE Program is considerable. In industries where licensing requirements do not pose significant barriers to entry, small entrepreneurs have proven time and again their capacity for innovation and creativity. The airline industry was revolutionized by startup Southwest Airlines; the aviation technology and (now) space industries by inventor Bert Rutan; the computer industry by Apple, and in an earlier time, the telecom industry itself by McCaw Communications. In today's telecom industry, however, barriers to entry, including licensing requirements, make it especially difficult for small firms to secure a foothold.^{6/} While there may be industries in which barriers to entry are insurmountable, there is nothing inherent in wireless technology that should limit the industry to large companies.

The DE Program is also deserving of the greatest respect as a means of fulfilling Congress' Section 151 and 309(j) nondiscrimination and minority ownership objectives. After the minority ownership elements of the DE Program were eliminated in the wake of Adarand Constructors, Inc. v. Peña, 515 U.S. 200

^{6/} In 1994, the Commission declared:

We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.

Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5585 ¶121 (1994). This holding has even greater force today in light of rapid consolidation in the industry in the past decade.

(1995) (Adarand III),^{7/} the remaining elements of the DE Program represent the Commission's only effort to promote minority ownership in the wireless industry.^{8/}

Originally, the DE Program directly fostered minority ownership. After Adarand III, however, the DE Program was restructured as a size-based, race-neutral initiative.^{9/} Thus, the DE Program invites no constitutional challenge.

^{7/} See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 143 ¶11 (1995).

^{8/} When an agency operates only one program aimed at fostering a vital objective, the repeal of that program could trigger heightened judicial scrutiny. Recently, the Commission tried to repeal its only program aimed specifically at fostering minority television ownership, the “Failing Station Solicitation Rule,” 47 C.F.R. §73.3555 n. 7, which required a waiver applicant to provide notice of the sale to potential out-of-market buyers before it could sell its failed, failing, or unbuilt television station to an in-market buyer. In Prometheus Radio Project v. FCC, Slip Op., pp. 94-95 (3d Cir., June 26, 2004) (“Prometheus”), the Court held that the Commission “entirely failed to consider an important aspect of the problem,” citing Motor Vehicle Mfgs. Ass’n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1982). The Court added that “[r]epealing its only regulatory provision that promoted minority television station ownership without considering the repeal’s effect on minority ownership is also inconsistent with the Commission’s obligation to make the broadcast spectrum available to all people ‘without discrimination on the basis of race,’” citing 47 U.S.C. §151. Prometheus, p. 96 n. 58.

^{9/} See Wireless Report and Order, 12 FCC Rcd 10785, 10878 ¶192 (1997) (declining to consider adopting race or gender conscious auction provisions, but noting that Commission has “initiated a comprehensive rule making proceeding to gather evidence regarding market barriers to entry faced by small businesses as well as minority- and women-owned firms [citing Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), 11 FCC Rcd 6280 (1996) (“Section 257 Inquiry”)]. If a sufficient record is adduced that will support race- and gender-based provisions that will satisfy judicial scrutiny, we will consider race- and gender-based provisions for future auctions.”)

Among the governmental interests that easily justify the current race-neutral DE Program are (1) promoting competition and reasonable rates; and (2) remedying the effects of past discrimination. Indeed, were the Commission someday to develop narrowly tailored race-conscious wireless ownership initiatives, competition and remediation ought to be sufficiently compelling to sustain such initiatives.

1. Promoting Competition and Reasonable Rates. Classic economic analysis explains the value of minority ownership in promoting competition. An artificially depressed level of any input to production diminishes the industry's competitiveness, which in turn increases costs borne by consumers. The Supreme Court has left open the question of whether promoting competition and reasonable rates might be a compelling governmental interest justifying narrowly-tailored race-conscious measures.^{10/} In the wireless industry, minority talent is often unable

^{10/} In NAACP v. FPC, 425 U.S. 662, 670 (1976), the Court found that the public interest standard in the Power and Gas Acts was "a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." Thus, it affirmed the D.C. Circuit's holding that the FPC could, but was not required to, conclude that "excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against" was "arguably within the Commission's range of concern" that "no unnecessary or illegitimate costs are passed along to that consumer." NAACP v. FPC, 520 F.2d 432, 444 (D.C. Cir. 1975). The public interest standard and substantive objectives applicable to wireless in the Communications Act are closely analogous to the public interest standard and substantive objectives of the Power and Gas Acts. Compare 47 U.S.C. § 151 (1996) with 16 U.S.C. § 824d (1975) (requiring FPC to establish just and reasonable rates for the transmission and sale of electrical energy) and 15 U.S.C. § 717c (1975) (requiring FPC to establish just and reasonable rates for the transmission and sale of natural gas). Thus, it appears that the FCC could conclude that the elimination of market entry barriers, such as racial discrimination, or the promotion of minority ownership, could advance the Communications Act's objectives of promoting competition and reasonable rates.

to attain its full potential through deployment in ownership and senior management. Inevitably, this underutilization of minority talent diminishes the competitiveness of the wireless industry and increases costs to consumers.

2. Remedying the Effects of Past Discrimination. Promoting minority ownership is also justifiable as a means of remedying the consequences of the Commission's own ratification and validation of past discrimination against minority new entrants.^{11/} The Commission's own research shows that minority ownership in the wireless industry has been inhibited by discrimination, and that the Commission may have been a passive participant in that discrimination.^{12/} In

^{11/} See, e.g., Reply Comments of MMTTC, PP Docket No. 93-253 (Reexamination of Section 309(j) of the Communications Act - Competitive Bidding), filed October 3, 1994, at 3 (applauding Commission's adoption of a 40% bidding credit and installment payment plan for designated entities for the regional narrowband auctions, and urging that “[i]t is also appropriate for the Commission to adopt additional minority ownership incentives”). In 2001, by denying certiorari in Adarand Constructors, Inc. v. Slater (“Adarand VII”), the Supreme Court paved the way for race-conscious minority contracting initiatives using the “socially and economically disadvantaged” (“SDB”) model. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), certiorari dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001).

^{12/} See Ernest & Young LLP, “FCC Econometric Analysis Of Potential Discrimination: Utilization Ratios For Minority- And Women-Owned Companies In FCC Wireless Spectrum Auctions” (2000) (finding that, measured across all wireless auctions through 1999, minority and women applicants were less likely to win at least one license than were non-minority applicants); William Bradford, “Study Of Access To Capital Markets And Logistic Regressions For License Awards By Auctions” (2000) (finding that minority borrowers paid higher interest rates on their loans, after controlling for the impact of the other variables; that loan applications of minority wireless firms were less likely to be accepted than those of non-minority firms, after controlling for the effect of the other variables on the lending decision; that minority borrowers paid higher interest rates on their loans,

MB Docket 04-228, the Commission will have an opportunity to examine this question.^{13/}

Thus, we ask that the Bureau specifically reaffirm the DE Program as set out in the Sixth R&O. Reaffirmation of the current DE Program would be the first step in a journey toward, ultimately, the development of a constitutionally sustainable minority ownership element of the DE Program.

^{12/} [continued from p. 6] after controlling for the impact of the other variables; and that minority status resulted in a lower probability of winning in spectrum auctions); Ivy Planning Group, “Whose Spectrum Is It Anyway? Historical Study Of Market Entry Barriers, Discrimination And Changes In Broadcast And Wireless Licensing – 1950 To Present” (2000) (concluding based on extensive anecdotal research that for minority and women owned licensees, market entry barriers were exacerbated by the discrimination minorities and women have faced in the capital markets, and by underutilized FCC minority incentive policies.)

^{13/} See Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies, Public Notice, DA 04-1690 (released June 15, 2004) (“Section 257 PN”). Although released by the Media Bureau, the Section 257 PN expressly seeks comment on research addressing minority and female ownership in the wireless industry. Id. The Commission has long intended to conduct such an inquiry. See Section 257 Inquiry, 11 FCC Rcd at 6305 ¶34 (seeking a “broad and comprehensive record from which to determine whether the experiences of women and particular minority groups in entering and participating in the telecommunications market warrant adopting more specific gender or race-based incentives[.]”) For its part, the Third Circuit has given the Commission a road map for the development of a race-conscious DE Program, such as one based on the “socially and economically disadvantaged” (SDB) model. Prometheus, supra, p. 110 n. 70 (in broadcast arena, “[w]e anticipate...that by the next quadrennial review the Commission will have the benefit of a stable definition of SDBs, as well as several years of implementation experience, to help it reevaluate whether an SDB-based waiver will better promote the Commission’s diversity objectives.”)

Respectfully submitted,

David Honig

David Honig
Executive Director
Minority Media and
Telecommunications Council
3636 16th Street N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Counsel for Designated
Entity Program Supporters

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